No. 07-956

In the Supreme Court of the United States

BIOMEDICAL PATENT MANAGEMENT CORPORATION,
PETITIONER

v.

STATE OF CALIFORNIA,
DEPARTMENT OF HEALTH SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether or in which circumstances a State's waiver of Eleventh Amendment immunity in one action extends to a subsequent action involving the same parties and the same underlying transaction or occurrence.

2. Whether or in which circumstances a State may waive its Eleventh Amendment immunity in patent actions by regularly and voluntarily invoking federal jurisdiction to enforce its own patent rights.

TABLE OF CONTENTS

Page

Statement 1
Discussion 5
I. The question whether, in the circumstances here, respondent's intervention in a separate suit waived its sovereign immunity from this suit does not warrant review 6
A. On the facts here, the court below correctly refused to extend respondent's earlier waiver to this separate suit 6
B. The decision below does not conflict with decisions of other courts of appeals 10
C. This case provides a poor vehicle for addressing the first question presented 12
II. The question whether a state waives immunity to all patent suits by regularly invoking federal jurisdiction in other, unrelated patent suits does not warrant review 14
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 6
Central Va. Cmty. Coll. v. *Katz*, 546 U.S. 356 (2006) 10
City of S. Pasadena v. *Mineta*, 284 F.3d 1154 (9th Cir. 2002) 7
Clark v. *Barnard*, 108 U.S. 436 (1883) 9
College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) ... 3, 6, 9, 14, 15

Cases—Continued: Page

Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627 (1999) 3, 6, 9, 14
Lapides v. *Board of Regents of Univ. Sys.*, 535 U.S. 613 (2002) 3, 6, 7, 9, 15
Lazar, In re, 237 F.3d 967 (9th Cir. 2001) 10
New Hampshire v. *Ramsey*, 366 F.3d 1 (1st Cir. 2004) 11, 12
Parden v. *Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964) 4
Robinette v. *Jones*, 476 F.3d 585 (8th Cir. 2007) 8
Rose, In re, 187 F.3d 926 (8th Cir. 1999) 10, 13
Tennessee Student Assistance Corp. v. *Hood*, 541 U.S. 440 (2004) 10

Constitution, statutes and rule:

U.S. Const. Amend. XI ..... *passim*
Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 14
28 U.S.C. 1391(b)(2) 2
35 U.S.C. 286 ..... 8, 12
Fed. R. Civ. P.:
Rule 41(a) 8
Rule 41(b) 8

Miscellaneous: Page

9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (1995) 7

18A Charles Alan Wright et al., *Federal Practice and Procedure* (2002) 8

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Petitioner brought this patent infringement action against respondent, alleging that respondent performs laboratory services, and induces others to perform services, that infringe petitioner's patented method of prenatal screening for birth defects. Pet. App. 2a. The district court dismissed the action on Eleventh Amendment grounds, holding that the State's waiver of its sovereign immunity in a prior suit did not extend to the present suit. *Id.* at 29a-42a. The court of appeals affirmed. *Id.* at 1a-28a.

1. In August 1997, Kaiser Foundation Health Plan, Inc. (Kaiser), a subcontractor of respondent, filed suit against petitioner in the United States District Court for the Northern District of California seeking a declaratory judgment that Kaiser did not infringe any valid claim of petitioner's patent. Pet. App. 30a. After respondent intervened in the litigation and sought similar relief, *id.* at 66a-69a, petitioner filed a compulsory counterclaim for patent infringement against respondent, *id.* at 73a-76a. Petitioner then moved for reconsideration of the district court's denial of its motion to dismiss the action for improper venue. *Id.* at 54a-55a. The court granted petitioner's motion, agreeing with petitioner that, for purposes of establishing venue under 28 U.S.C. 1391(b)(2), "the relevant conduct" was that of petitioner, the defendant, rather than that of Kaiser, the plaintiff. Pet. App. 55a. On May 6, 1998, the court dismissed the case without prejudice. *Ibid.*

Six days later, on May 12, 1998, petitioner filed suit against respondent in the United States District Court for the Southern District of California, pressing the same claims it had in its prior counterclaim. Pet. App. 61a-65a. Respondent invoked its sovereign immunity under the Eleventh Amendment and did not press a counterclaim. *Id.* at 48a-49a. Within six months of filing suit, petitioner moved to voluntarily dismiss its suit without prejudice, on the ground that this Court might grant review to resolve a conflict in the circuits regarding the scope of state sovereign immunity from intellectual property claims. *Id.* at 46a-47a. Respondent opposed the motion or, in the alternative, requested that any dismissal be subject to conditions. *Id.* at 46a, 50a-53a. In November 1998, the district court dismissed the case without prejudice and without conditions. *Id.* at 44a-53a. Shortly thereafter, this Court granted review in two cases and ultimately held that the State defen-

dants' Eleventh Amendment immunity from patent and Lanham Act claims had not been properly abrogated or waived. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (*College Savings Bank*); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999) (*Florida Prepaid*).

2. More than six years later, in February 2006, petitioner filed this suit against respondent in the United States District Court for the Northern District of California—the district in which the Kaiser action was initially filed in 1997—alleging the same theories of patent infringement that it had in the first and second suits. Pet. App. 57a-60a. Respondent once again asserted Eleventh Amendment immunity and sought dismissal on that basis. *Id.* at 29a.

The district court granted respondent's motion to dismiss. Pet. App. 29a-42a, 43a. The court noted respondent's concession that its intervention in the first action to assert claims against petitioner had waived its sovereign immunity to compulsory claims *in that action*. *Id.* at 33a. The court concluded, however, that the first suit should be treated as if it had never been filed, because the suit had been dismissed without prejudice for improper venue. *Id.* at 35a-37a. The court distinguished *Lapides* v. *Board of Regents of University System*, 535 U.S. 613 (2002), observing that respondent's "waiver took place in a previous action which was dismissed without prejudice." Pet. App. 37a. Accordingly, the court concluded that respondent could assert sovereign immunity in this action. *Ibid.*

The court also rejected petitioner's contention that the State's voluntary invocation of the patent system acted as a general waiver of the State's sovereign immunity in all patent suits. Pet. App. 40a-41a. Although the court noted

that it was "troubled by the University of California's ability to reap the benefits of the patent system without being exposed to liability for infringement," *id.* at 40a, it concluded that the State's waiver of immunity in several past patent suits did not "serve as an express waiver of immunity in this lawsuit." *Id.* at 41a. Rather, the court reasoned that the State's participation in the patent system "falls squarely under the rubric of constructive waiver which was rejected when the *College Savings Bank* court overruled *Parden* [v. *Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964)]." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-28a. The court rejected petitioner's "contention that waiver of immunity in one suit should extend to a separate action simply because the action involves the same parties and the same subject matter," holding instead that "a State's waiver of immunity generally does not extend to a separate or re-filed suit" and that "even a waiver by litigation conduct must * * * be 'clear.'" *Id.* at 20a. In the court's view, those principles distinguished the present suit from the cases on which petitioner relied, see *id.* at 12a-18a, all of which entailed "a State's waiver of immunity in the same continuous proceeding." *Id.* at 18a. In so holding, however, the court noted that it did "not mean to draw a bright-line rule whereby a State's waiver of sovereign immunity can never extend to a re-filed or separate lawsuit." *Id.* at 20a.

The court further concluded that this Court's decision in *Lapides* did not compel a different conclusion. Pet. App. 10a-13a, 20a-22a. The court observed that *Lapides* "did not involve the effect of waiver of immunity in one case on a State's ability to later assert immunity in a separate case; it involved waiver based on actions that occurred in the same action." *Id.* at 13a. Moreover, the court concluded that the concerns discussed in *Lapides*—including the

"need to avoid 'unfairness' and 'inconsistency,' as well as to prevent a State from selectively using immunity to achieve a litigation advantage"—"simply are not present in the case at bar." *Id.* at 21a. The court observed that respondent had not selected the venue in the first suit but had merely intervened in a preexisting suit, and that the current action had been brought in the same venue as that suit. *Id.* at 22a.

The court of appeals also rejected petitioner's argument that the State's conduct "in the patent system, and particularly patent litigation, operates as a general waiver" of sovereign immunity from patent suits for all State entities. Pet. App. 27a. The court observed that this Court's decision in *College Savings Bank* overruled precedent supporting the notion that a State "can constructively waive its Eleventh Amendment immunity by its participation in a regulatory scheme." *Ibid.*

DISCUSSION

Certiorari is not warranted on either question presented. The court of appeals correctly held that, on the peculiar facts of this case, respondent did not waive its sovereign immunity from this patent-infringement suit by intervening in a separate suit nine years earlier. The court's decision is consistent with decisions of this Court and it does not conflict with any decision of any other court of appeals. Moreover, this case presents a poor vehicle for addressing whether a State's waiver in one action extends to a subsequent action involving the same parties and the same underlying transaction or occurrence. The facts are not only unusual, but in light of the applicable limitations period, this case appears to involve alleged acts of infringement that occurred *after* the dismissal of the earlier suit.

The separate question whether a State's regular and voluntary participation in federal-court patent litigation

broadly waives its Eleventh Amendment immunity from all patent actions is undeniably important. The decision below, however, accords with this Court's decisions in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), and *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999). Moreover, petitioner's proposed rule—which turns on the potentially unworkable determination of whether a State "regularly" invokes the federal courts' jurisdiction in patent cases—has less to commend it than the more straightforward approaches the Court rejected in *Florida Prepaid* and *College Savings Bank*. Accordingly, the Court should deny the petition for a writ of certiorari.

I. THE QUESTION WHETHER, IN THE CIRCUMSTANCES HERE, RESPONDENT'S INTERVENTION IN A SEPARATE SUIT WAIVED ITS SOVEREIGN IMMUNITY FROM THIS SUIT DOES NOT WARRANT REVIEW

A. On The Facts Here, The Court Below Correctly Refused To Extend Respondent's Earlier Waiver To This Separate Suit

The court of appeals held that "a State's waiver of immunity generally does not extend to a separate or re-filed suit," but the court did not "draw a bright-line rule whereby a State's waiver of sovereign immunity can never extend to a re-filed or separate lawsuit." Pet. App. 20a. That general rule is correct. The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985). Although "waivers effected by litigation conduct" are binding on States that subsequently seek to avail themselves of Eleventh Amendment immunity, the State's intent to waive its immunity must be "clear." *Lapides* v. *Board of Regents of Univ. Sys.*, 535 U.S. 613,

619-620 (2002). As the court of appeals concluded, unless a waiver in one suit "'clearly' extend[s] to a separate lawsuit," it "generally would not preclude a State from asserting immunity in that separate action." Pet. App. 20a.

As this Court has held, a State can waive its Eleventh Amendment immunity through litigation conduct that "clearly" invokes an intent to subject itself to federal jurisdiction in "the case at hand." *Lapides*, 535 U.S. at 619-620. That is so because "it would be unfair to allow a State to take both positions in 'the same case,'" specifically, "to allow a State to invoke jurisdiction for the 'case at hand' and then to claim Eleventh Amendment immunity, thereby denying that jurisdiction extends to the 'case at hand.'" Pet. App. 12a (quoting *Lapides*, 535 U.S. at 619). But that rationale does not support extending a State's waiver in one suit to "a separate action simply because the action involves the same parties and same subject matter." *Id.* at 20a.

Here, the court of appeals correctly refused to extend respondent's waiver in the first suit to this third suit. That conclusion is supported by a number of factors. First, respondent's earlier waiver occurred in an entirely separate lawsuit: this suit is not formally related to, ancillary to, or a continuation of the first suit. Second, respondent did not initiate the first suit, but instead intervened in it. Third, the first suit was dismissed without prejudice, at petitioner's behest. As the district court concluded, dismissal without prejudice generally leaves "the situation as if the action never had been filed," in effect wiping the slate clean with respect to the State's voluntary appearance in federal court. Pet. App. 36a (quoting 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2373 n.8 (1995) (Wright & Miller)); see, *e.g.*, *City of S. Pasadena* v.

Mineta, 284 F.3d 1154 (9th Cir. 2002).[1] Fourth, respondent never manifested any intent, much less a clear intent, that its waiver extend beyond that first suit. To the contrary, respondent promptly invoked its Eleventh Amendment immunity in both the second suit and this third suit, without asserting any claims of its own. Pet. App. 4a (in answer to the second suit), 5a-6a (in motion to dismiss the third suit). Finally, this suit and the first one appear to involve different acts of infringement, because the limitation period for recovering on the allegations in the first suit evidently expired before petitioner filed this one. See 35 U.S.C. 286; pp. 12-13, *infra*.

Petitioner nevertheless contends (Pet. 11-15) that respondent's earlier waiver extends to this suit. Petitioner claims that "[t]he same problems of 'inconsistency and unfairness' that existed in *Lapides* exist when a state waives its Eleventh Amendment immunity and then seeks to assert immunity in a case involving the same parties and the same underlying transaction or occurrence." Pet. 11-12. But, as the court of appeals concluded, the same considerations of unfairness and inconsistency "simply are not present" in this case. Pet. App. 21a. Unlike the State defendant in *Lapides*, respondent has never contended that federal jurisdiction extends "to the case at hand," and respondent

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[1] Petitioner contends (Pet. 19-20 & n.7; Pet. Reply 2-3) that an involuntary dismissal under Federal Rule of Civil Procedure 41(b) for improper venue, in contrast to a voluntary dismissal under Rule 41(a), does not result in the action being treated as if it had never been brought. To be sure, a dismissal under Rule 41(b) because of improper venue "generally do[es] preclude relitigation of the underlying issue of * * * venue." 18A Wright & Miller § 4435 (2002). But, at least where (as here) the court did not rule on the separate immunity issue before dismissing without prejudice, see *Robinette* v. *Jones*, 476 F.3d 585, 589 (8th Cir. 2007), a State's waiver of sovereign immunity does not necessarily survive such a dismissal under Rule 41(b).

thus is not trying both to invoke and deny federal jurisdiction in the very same action. See *Lapides*, 535 U.S. at 619-623. In addition, whatever may be the situation in hypothetical cases with different facts, there is no reason to believe that respondent is attempting "to litigate [this] matter in the court of its choosing or not at all." Pet. 12. As the court of appeals observed (Pet. App. 22a), respondent did not initiate the first suit; rather, it simply intervened and asserted claims in another's action. Pet. App. 3a-4a. And *petitioner* filed this suit in that very same venue. *Id.* at 22a.

Petitioner's claims of inconsistency and unfairness ring hollow in the face of its own litigation conduct. Petitioner could have proceeded on its claims against respondent in the first suit, in which respondent had intervened and thereby subjected itself to federal-court jurisdiction of petitioner's compulsory counterclaims. See, *e.g.*, *Clark* v. *Barnard*, 108 U.S. 436, 447-448 (1883). Instead petitioner successfully moved to dismiss that suit for improper venue. Petitioner also could have litigated the State's claim to immunity in the second suit, which petitioner filed in its venue of choice. Instead, petitioner moved to dismiss its own suit before this Court granted review in *Florida Prepaid* and *College Savings Bank*, thereby avoiding the risk that this Court would resolve those cases (as it ultimately did) in ways that support respondent's claim to immunity. See *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 634-648 (1999) (holding legislative record insufficient to sustain abrogation of Eleventh Amendment immunity to patent suits); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-687 (1999) (holding that State did not constructively waive its immunity by participating in market activity, despite statutory provision purporting to subject States to Lanham Act suits). Petitioner then waited more

than six years before bringing this action, and filed it in the very venue to which it had previously objected. Pet. App. 5a.

B. The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals

The courts of appeals are not in conflict as to whether a State's Eleventh Amendment immunity is waived under the circumstances here.

1. Petitioner points to two bankruptcy cases (Pet. 15-20; Pet. Reply 6-7), both of which hold that claims related to a bankruptcy estate may be sufficiently intertwined with a claim filed by a State to be regarded as a single proceeding for purposes of assessing the scope of a State's waiver of Eleventh Amendment immunity. See *In re Lazar*, 237 F.3d 967, 979-980 (9th Cir. 2001) (*Lazar*); *In re Rose*, 187 F.3d 926, 929-930 (8th Cir. 1999) (*Rose*). But that conclusion reflects the unique character of bankruptcy, recognized by this Court in *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 450 (2004), which focuses not on damages or monetary relief but on the distribution of the bankruptcy res. See *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 362, 369-370 (2006). Indeed, the Eighth Circuit in *Rose* took pains to emphasize that its decision did "not present a general question of Eleventh Amendment immunity," but rather was an artifact of well-established common-law rules particular to bankruptcy. 187 F.3d at 929. Contrary to petitioner's suggestion (Pet. Reply 6), both *Rose* and *Lazar* adverted to that unique history not only with respect to the effect of the State's filing of a claim, but also as to the scope of the State's resulting waiver of immunity. See *Rose*, 187 F.3d at 930 & n.8; *Lazar*, 237 F.3d at 977-978 (relying primarily on decisions in bankruptcy cases).

Moreover, as petitioner acknowledges, in light of this Court's subsequent decisions in *Hood* and *Katz*, there is "some question" whether the issues in *Rose* and *Lazar* "might now be decided on the ground that states do not enjoy Eleventh Amendment immunity with respect to certain aspects of bankruptcy proceedings." Pet. 18 n.6. That further undermines the existence of any conflict as to those cases. Moreover, even if, as petitioner predicts (*ibid.*), courts in the future treat *Rose* or *Lazar* as having precedential effect "outside the bankruptcy context," the Court can assess whether to grant review at that time.

2. Petitioner also points to *New Hampshire* v. *Ramsey*, 366 F.3d 1 (1st Cir. 2004). Pet. 18-19. In *Ramsey*, the State successfully sought dismissal of the plaintiffs' suit on the ground that the plaintiffs were first required to exhaust federal administrative remedies. *Id.* at 9-10. When the plaintiffs subsequently obtained relief through that administrative process, the State brought suit and challenged the result based on sovereign immunity. *Id.* at 13. The First Circuit explained that such immunity was waived because the State had "agreed to a federal administrative forum." *Id.* at 15, 16. "By invoking [administrative] grievance procedures (knowing that those procedures ultimately provided for federal judicial review) to obtain dismissal of a claim for injunctive relief, and then participating in the administrative process," the court concluded, "the state has waived any immunity it may have to a federal forum." *Id.* at 16. Here, in contrast, *petitioner* was the party that successfully urged dismissal of the first suit and, since that time, respondent has consistently invoked its immunity to federal adjudication. See Pet. App. 4a, 5a-6a.

Petitioner contends that *Ramsey* stands for the proposition that "a waiver of Eleventh Amendment immunity in one proceeding can extend to related proceedings." Pet. 18.

But the *Ramsey* court disclaimed such a view, emphasizing that its finding of a waiver did not rely merely on "a simple failure by the state to raise Eleventh Amendment immunity in earlier proceedings." 366 F.3d at 17; see *id.* at 16 ("This case goes well beyond a simple matter of failure to raise an immunity argument in earlier proceedings."). Rather, the court relied on the State's actions postdating the first proceeding, observing that "[i]n essence, the state voluntarily invoked the jurisdiction of a federal agency * * * and the federal courts in review of the agency determination." *Ibid.* In any event, the decision below did not hold that a State's actions in one proceeding can *never* waive sovereign immunity in subsequent suits. See Pet. App. 20a ("[W]e do not mean to draw a bright-line rule whereby a State's waiver of sovereign immunity can never extend to a re-filed or separate lawsuit."). It simply held that extending respondent's waiver to this subsequent suit was not appropriate in the particular context of this case.

C. This Case Provides A Poor Vehicle For Addressing The First Question Presented

This case presents a poor vehicle for addressing whether an Eleventh Amendment waiver extends to other suits involving "the same parties and the same underlying transaction or occurrence." Pet. i. Contrary to petitioner's assertion (Pet. 17-18), the events underlying the first suit and this third suit are not "identical." Although petitioner's complaint is nearly the same as its counterclaim nine years earlier, neither set of allegations identifies any particular act of infringement. Pet. App. 57a-60a, 73a-75a. Because federal law generally provides that "no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action," 35 U.S.C. 286, any recovery by

petitioner here would likely be limited to the six years preceding its filing of this suit. Petitioner appears to recognize as much in its prayer for relief, which requests prejudgment interest on damages "from the date(s) incurred during the past six years until judgment." Pet. App. 60a. Petitioner, however, filed this suit well over six years after dismissal of the first action. As such, it is, at a minimum, doubtful that any of the same acts of alleged infringement are at issue in the two cases.[2] Because this case likely does not involve the same underlying transaction or occurrence as the suit in which respondent intervened, it is a not an appropriate vehicle for resolving whether a waiver of immunity always carries over to such a suit.

Moreover, this case lacks ongoing significance given that its outcome is tied to its particular—and particularly unusual—facts. As the decision below and the cases relied on by petitioner reflect, the scope of a State's waiver will often turn on the specific litigation conduct at issue in a given case. See, *e.g.*, *Rose*, 187 F.3d at 930 (noting that the court was faced only with a "narrow issue" of whether the State defendant had waived its immunity "on this record"). That different outcomes may arise in different settings underscores that further review of such a fact-specific inquiry is unwarranted, especially given the peculiar facts and litigation history of this case. See pp. 7-8, *supra*.

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[2] Petitioner's original counterclaim requested injunctive relief as well as damages. Pet. App. 75a. To the extent that such a remedy would have precluded the infringements alleged in petitioner's 2006 complaint, the requested relief in both suits may overlap. It is not clear, however, whether the transactions underlying petitioner's first suit—and on which petitioner's request for relief was based—include any infringements that overlap with those alleged in petitioner's 2006 complaint. And that issue was not addressed by the courts below.

II. THE QUESTION WHETHER A STATE WAIVES IMMUNITY TO ALL PATENT SUITS BY REGULARLY INVOKING FEDERAL JURISDICTION IN OTHER, UNRELATED PATENT SUITS DOES NOT WARRANT REVIEW

Petitioner relies on *Lapides* (Pet. 23, 25; Pet. Reply 8) to contend that the State, "[t]hrough its pervasive use of the federal courts to resolve patent disputes, * * * has waived its immunity by litigation conduct." Pet. 24. The crux of petitioner's claim is that federal courts should imply waivers in a broad array of patent cases based on a State's voluntary participation in other, unrelated patent suits. That claim undeniably implicates important issues. As the United States explained in its brief in *Florida Prepaid*, state entities are increasingly involved in the intellectual property marketplace. See U.S. Br. at 20-24, *Florida Prepaid*, *supra* (No. 98-531). The States are not only asserting their own patent rights, but are also allegedly infringing others' patent rights. Private inventors need a remedy to protect their patent rights against infringement by state entities and, as Congress determined in the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), Pub. L. No. 102-560, 106 Stat. 4230, such remedies should be available in federal court.

Nevertheless, the Court's decision in *Florida Prepaid* invalidated the Patent Remedy Act's abrogation of Eleventh Amendment immunity from patent suits. 527 U.S. at 634-648. And in *College Savings Bank*, the Court also held that a State's participation in market activities regulated by the Lanham Act does not constructively waive the State's sovereign immunity from suits under that statute. 527 U.S. at 675-687. In so holding, the Court specifically rejected the notion that a State's "decision to engage in otherwise lawful activity" could provide the basis for waiving its Eleventh Amendment immunity. *Id.* at 679 n.2.

Petitioner's contention here has far less in common with the case-specific waiver recognized in *Lapides* than with the doctrine of constructive waiver rejected by this Court in *College Savings Bank*. Petitioner argues that the State's lawful resort to the federal courts in unrelated patent suits about once a year over the past two decades amounts to a waiver of immunity from all patent suits. See Pet. 22-23; Pet. App. 99a-101a. That result would be difficult to square with the holding and rationale of *College Savings Bank*.

To be sure, petitioner's argument (Pet. 24-25) is not precisely the same as the constructive-waiver argument rejected in *College Savings Bank*. Petitioner acknowledges that "California's mere participation in the patent marketplace does not effect a waiver of sovereign immunity." Pet. 25. Instead, it urges that the State has implicitly waived its immunity by its "continuous use of the federal courts" in pursuing other patent suits. *Ibid.* Whatever the equitable appeal of petitioner's argument, this Court has held that an action by a State, whether in the context of litigation or otherwise, must be "clear" and "unequivocal" in order to waive immunity. See, *e.g.*, *Lapides*, 535 U.S. at 620; *College Sav. Bank*, 527 U.S. at 680-681. Under petitioner's proposed rule, it is not clear at what point a State would be deemed to have voluntarily participated in enough federal-court patent suits to have waived its Eleventh Amendment immunity from all such suits. Nor is it evident how a State would know in advance when it was poised to cross the waiver threshold. As such, even setting *College Savings Bank* to the side, it would be difficult to attribute to the State the requisite "unequivocal" intention to waive its immunity from all patent suits. See *ibid.*

In the end, petitioner's request for a judicially crafted waiver rule—which would allow courts to infer a broad waiver of Eleventh Amendment immunity on an ad hoc

basis because of some quantum of participation by a State in unrelated patent cases—has less to recommend it than the congressional abrogation rejected in *Florida Prepaid* or the statutorily based waiver rejected in *College Savings Bank*. It is also unclear that respondent waived its sovereign immunity from all patent suits even under petitioner's proposed standard, because respondent has filed only approximately one patent infringement suit per year. See p. 15, *supra*. Notably, petitioner does not ask the Court to reconsider *Florida Prepaid* or *College Savings Bank*, nor does petitioner rely on the statutory abrogation to patent suits effectively set aside in *Florida Prepaid*. Accordingly, further review of petitioner's proposed legal standard is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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